Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services	)	WT Docket No. 96-162
Implementation of Section 601(d) of the Telecommunications Act of 1996	)	
Petition for Forbearance of the Independent Telephone and Telecommunications Alliance	)	AAD File No. 98-43

FIRST ORDER ON RECONSIDERATION AND FIRST MEMORANDUM OPINION AND ORDER

Adopted: May 18, 1999 **Released:** June 30, 1999

By the Commission: Commissioner Ness concurring and issuing a statement; Commissioners Furchgott-Roth and Powell dissenting and issuing separate statements.

I. INTRODUCTION

1. On January 2, 1998, the Independent Telephone and Telecommunications Alliance (ITTA) filed a petition for reconsideration (Petition for Reconsideration)[1] of the Commission's *LEC-CMRS Safeguards Order*.[2] In that Order, the Commission adopted a separate affiliate requirement for incumbent Local Exchange Carrier (LEC) provision of in-

[1] ITTA Petition for Reconsideration.

[2] Amendment of the Commissions Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, WT Docket No. 96-162, *Report and Order*, 12 FCC Rcd 15668 (1997) (*LEC-CMRS Safeguards Order*), *recons pending, appeal pending sub nom* GTE of the Midwest, Incorporated v. FCC & USA, No. 98-3167 (6th Cir. filed Dec. 12, 1997). (Aliant Communications, Inc. and Guam Cellular and Paging, Inc. also filed petitions for reconsideration. Those petitions are pending.)

region Commercial Mobile Radio Service (CMRS).[3] The Commission also found, "consistent with Congress's treatment of LECs in Section 251, that incumbent LECs with fewer than two percent of the nation's subscriber lines, may petition . . . for suspension or modification of the separate affiliate requirement."[4] ITTA requests that the Commission reconsider the application of the separate subsidiary requirement to mid-sized LECs.[5] MCI filed an opposition to ITTA's Petition for Reconsideration, and ITTA and the United States Telephone Association replied to that opposition.

2. On February 17, 1998, ITTA filed a petition requesting that the Commission exercise its authority under section 10 of the Communications Act of 1934, as amended,[6] to forbear from applying to local exchange companies serving less than two percent of the nation's access lines (mid-sized LECs) several of our existing regulations, including our LEC-CMRS safeguards requirements (Petition for Forbearance). On April 2, 1998, the Accounting and Audits Division of the Common Carrier Bureau issued a public notice seeking comment on ITTA's Petition for Forbearance.[7] Seven parties filed comments on the petition and four parties filed reply comments.[8] On January 19, 1999, the deadline for the Commission's action on ITTA's Petition for Forbearance was extended by 90 days to May 18, 1999.[9]

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[3] We will refer to the separation requirements set forth in section 20.20 of the Commission's rules (47 C.F.R. § 20.20) as the "LEC-CMRS safeguards requirements."

[4] *LEC-CMRS Safeguards Order,* 12 FCC Rcd. 15709-10, ¶ 71.

[5] We use the term "mid-sized LEC" to refer to a LEC with fewer than 2 percent of the nation's subscriber lines, and that does not fall within the Act's definition of "rural telephone company." *See LEC-CMRS Safeguards Order*, 12 FCC Rcd at 15709, ¶ 70. A LEC can qualify as a "rural telephone company" based on its small size or its location in a rural geographic area. *See* 47 U.S.C. § 153(37).

[6] 47 U.S.C. § 160.

[7] Independent Telephone and Telecommunications Alliance Files Petition for Forbearance for 2% Mid-Size Incumbent Local Exchange Companies, *Public Notice*, AAD 98-43, DA 98-480 (rel. Apr. 2, 1999).

[8] Comments were filed by Ameritech; AT&T; Bell Atlantic; GTE; SBC Communications, Inc. (SBC); Telecommunications Resellers Association (TRA); and United States Telephone Association (USTA). Reply comments were filed by the Anchorage Telephone Utility (ATU), Cincinnati Bell Telephone Company (Cincinnati Bell), General Communication, Inc. (GCI), and ITTA.

[9] Petition for Forbearance of the Independent Telephone and Telecommunications Alliance, AAD 98-43, *Order*, DA No. 99-197 (CCB rel. Jan. 20, 1999).

3. In this order, we address only ITTA's request in these proceedings to allow its members to provide CMRS within their territories free of the separate affiliate requirements set forth in section 20.20 of the Commission's rules.[10] ITTA's remaining requests in its Petition for Forbearance are addressed in other Commission orders.[11] For the reasons stated below, we deny ITTA's forbearance petition to the extent that it requests forbearance from the LEC-CMRS safeguards requirements, and we deny its request for reconsideration.

II. BACKGROUND

4. In the *LEC-CMRS Safeguards Order*, we reviewed our existing regulatory safeguards for the provision of "broadband CMRS"[12] by incumbent LECs and their affiliates, making several modifications to our rules and procedures. Section 20.20 of the Commission's rules, which was adopted in the *LEC-CMRS Safeguards Order*, requires incumbent LECs, including the Bell Operating Companies (BOCs), that continue to have the incentive and ability to use control of "bottleneck" local exchange facilities to engage in anticompetitive behavior, to provide in-region broadband CMRS through a separate CMRS affiliate.[13] Specifically, incumbent LECs subject to our CMRS affiliate requirements must establish a separate corporation for in-region broadband CMRS operations. This separate affiliate must: (1) maintain separate books of account; (2) not jointly own transmission or switching facilities

[10] 47 C.F.R. § 20.20.

[11] Petition for Forbearance of the Independent Telephone and Telecommunications Alliance, AAD File No. 98-43, *Second Memorandum Opinion and Order*, FCC 99-104 (rel. June 30, 1999); Petition for Forbearance of the Independent Telephone and Telecommunications Alliance, AAD File No. 98-43, *Third Memorandum Opinion and Order*, FCC 99-105 (rel. June 30, 1999); 1998 Biennial Regulatory Review - - Review of Accounting and Cost Allocation Requirements, *Report and Order* in CC Docket No. 98-81, *Order on Reconsideration* in CC Docket No. 96-150, *Fourth Memorandum Opinion and Order* in AAD File No. 98-43, FCC 99-106 (rel. June 30, 1999); 1998 Biennial Regulatory Review - - Review of ARMIS Reporting Requirements, *Report and Order* in CC Docket No. 98-117, *Order on Reconsideration* in CC Docket No. 96-150, *Fifth Memorandum Opinion and Order* in AAD File No. 98-43, FCC 99-107 (rel. June 30, 1999); Petition for Forbearance of the Independent Telephone and Telecommunications Alliance, AAD File No. 98-43, *Sixth Memorandum Opinion and Order*, FCC 99-108 (rel. June 30, 1999).

[12] In this context, we define broadband CMRS as "Domestic Public Cellular Radio Telecommunications Service (Part 22, Subpart H of this chapter), Specialized Mobile Radio Service (Part 90, Subpart S of this chapter), and broadband Personal Communications Services (Part 24, Subpart E of this chapter)." *See* 47 C.F.R. § 20.20.

[13] "An incumbent LEC's broadband CMRS service is considered 'in-region' when 10 percent or more of the population covered by the CMRS affiliate's authorized service area, as determined by the 1990 census figures, is within the affiliated incumbent LEC's wireline service area." 47 C.F.R. § 20.20(e).

with its affiliated LEC that the LEC uses for the provision of local exchange services in the same market; and (3) acquire any services from the affiliated LEC on a compensatory arm's length basis pursuant to our affiliate transaction rules.[14] Title II common carrier services or services, facilities, or network elements provided pursuant to sections 251 and 252 that are acquired from the affiliated LEC must be available to all other carriers, including CMRS providers, on the same terms and conditions.[15] The CMRS affiliate and the LEC may share officers, directors, and other personnel.[16] In addition, the CMRS affiliate may own its own landline facilities and offer competitive landline local exchange service without restriction on technology.[17] These separate affiliate requirements went into effect on February 11, 1998.

5. Prior to the *LEC-CMRS Safeguards Order*, under subsection 22.903 of the Commission's rules,[18] separation requirements applied only to BOC provision of cellular service.[19] The Commission found those requirements to be overly burdensome and not effective in constraining anticompetitive practices of the BOCs in their provision of CMRS.[20] The Commission was concerned, however, that recent developments in the CMRS market, such as direct competition among telecommunications carriers facilitated by the 1996 amendments to the Communications Act,[21] increased competition within the CMRS marketplace, and the development of fixed wireless services, may create even larger incentives for anticompetitive conduct by all incumbent LECs, not just the BOCs. Specifically, we found that "[t]he competitive pressure brought to bear on the local exchange market by CMRS providers could increase the incentive for LECs to engage in discriminatory and other anticompetitive practices,"[22] such as discrimination against CMRS competitors

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[14] 47 C.F.R. § 20.20(a).

[15] *See LEC-CMRS Safeguards Order*, 12 FCC Rcd at 15693, ¶ 38.

[16] *See id.* at 15706, ¶ 64.

[17] *See id.* at 15707, ¶ 65.

[18] 47 C.F.R . § 22.903 (1997).

[19] *See LEC-CMRS Safeguards Order*, 12 FCC Rcd at 15674, ¶ 6.

[20] *Id.* at 15702, ¶ 56.

[21] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[22] *LEC-CMRS Safeguards Order*, 12 FCC Rcd at 15701, ¶ 54.

requesting interconnection, cost-shifting, and anticompetitive pricing practices.[23] The Commission held that this increasing competition necessitated expansion of the rules to all incumbent LECs providing in-region CMRS.[24] In striking the balance between the need to restrain anticompetitive behavior by incumbent LECS and eliminating overly burdensome regulations, the Commission chose to adopt the less burdensome requirements set forth in section 20.20.[25] As part of that balance, the Commission also decided to sunset these requirements on January 1, 2002.[26]

6. The Commission found that it did not need to impose any separation requirements on incumbent LECs in their provision of CMRS in circumstances in which they have little incentive and ability to use the control of "bottleneck" local exchange facilities to affect competition. For that reason, the separation requirements are limited to the provision of CMRS by incumbent LECs only within their local exchange service areas. The Commission also adopted less stringent separation requirements for rural and mid-sized LECs. Rural telephone companies are exempt from the separate affiliate requirement.[27] A competing CMRS carrier interconnected with the rural telephone carrier, however, may petition the Commission to remove the exemption, or the Commission may do so on its own motion, where the rural telephone company has engaged in anticompetitive conduct, such as discrimination. Mid-sized LECs serving fewer than two percent of the nation's subscriber lines are entitled to petition the Commission for suspension or modification of the separate affiliate requirement.[28] Moreover, the rule applies "in-region" CMRS structural safeguards only in those circumstances in which at least 10 percent of the total population of the incumbent LEC's CMRS licensed service area is within its wireline service areas.[29]

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[23] *Id.* at 15670, ¶ 1, 15701, ¶¶ 53-54.

[24] *Id.* at 15692, ¶ 37.

[25] *Id.* at 15702, ¶ 56.

[26] *Id.* at 15724, ¶ 99. *See* 47 C.F.R. § 20.20(f).

[27] 47 C.F.R. § 20.20(d)(1).

[28] 47 C.F.R. § 20.20(d)(2).

[29] *See* 47 C.F.R. § 20.20(e).

III. DISCUSSION

A. Petition for Forbearance

7. Under section 10 of the Communications Act, as amended (Act), we must forbear from applying any regulation or provision of the Act to a telecommunications carrier or service, or class of telecommunications carriers or services, in any or some of its geographic markets if a three-pronged test is met.[30] Specifically, section 10 requires forbearance if the Commission determines that: (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.[31] The Commission is required to consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services.[32] Section 10 also provides that any forbearance petition filed thereunder shall be deemed granted one year after its receipt unless it is denied by the Commission for failure to meet the forbearance requirements contained in section 10(a).[33]

8. Upon review of the record in this proceeding, we do not find that ITTA has satisfied the requirements of section 10. Thus, we will not forbear from requiring mid-sized

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[30] 47 U.S.C. § 160.

[31] 47 U.S.C. § 160.

[32] 47 U.S.C. § 160(b). Section 10(b) also provides that, "[i]f the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest." *Id.*

[33] The statute also provides that the one-year period may be extended by an additional 90 days. 47 U.S.C. § 160(c). There was a 90-day extension for Commission consideration of all of the issues raised by the ITTA Petition for Forbearance. *See* Petition for Forbearance of the Independent Telephone and Telecommunications Alliance, AAD 98-43, *Order*, DA No. 99-197 (CCB rel. Jan. 20, 1999).

LECs to utilize a separate affiliate to provide in-region CMRS at this time.[34] We note, however, that this requirement is scheduled to sunset on January 1, 2002.[35]

9. As to the first forbearance criterion, we conclude that the record does not show that application of the LEC-CMRS safeguards requirements to mid-sized LECs is not necessary to ensure that the charges, practices, and classifications of such LECs are just and reasonable and are not unjustly or unreasonably discriminatory. To support its request, ITTA argues that: (1) "existing rules and, to a lesser degree, market behavior protect carriers from unreasonable discrimination and consumers from unreasonable rates . . . Specifically, the accounting and cost allocations safeguards in Parts 32 and 64 of the Commission's rules already prevent the misallocation of costs and cross subsidization by setting up a cost accounting system designed to track costs accurately"[36]; (2) "the FCC's [section 208] complaint process is a fully effective vehicle available to carriers alleging that a mid-size incumbent LEC has engaged in anticompetitive or discriminatory interconnection practices"[37]; (3) "competing CMRS providers, like [competitive local exchange carriers], serve as private 'attorneys general' that constantly monitor ILEC activities for any evidence of discrimination"[38]; and (4) competitive forces in the local market would prevent mid-size incumbent LECs from raising "regulated telephone rates in order to fund anticompetitive cross subsidies to commonly owned CMRS ventures."[39]

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[34] We also reject the requests of several commenters that we expand ITTA's forbearance request to all LECs or, alternatively, independent LECs with 50,000 or fewer access lines. *See* Ameritech Comments at 4 ("At a minimum, any selective reduction in regulatory requirements for mid-size LECs should not be adopted without also considering the possible negative effect on large LECs and the opportunity to reduce such requirements for *all* LECs")(emphasis in original); Bell Atlantic Comments at 9 (forbearance should apply to "all local carriers"); GTE Comments at 5-6 (forbearance should apply to "all carriers" or "all encumbered firms"); SBC Comments at 2 ("all local exchange carriers"); TRA Comments at 6 ("[T]he regulatory burdens of compliance, in the case of incumbent LECs with 50,000 or fewer access lines, outweigh the continued necessity of complying with the obligations discussed in ITTA's petition."); USTA Comments at i and 20 ("no reason to limit regulatory relief to only one class of competitors"). Those requests are not properly before the Commission in this proceeding since they were not included in the forbearance petition.

[35] 47 C.F.R. § 20.20(f).

[36] ITTA Petition at 44.

[37] *Id.*

[38] *Id.*

[39] *Id.* at 45.

10. We reject ITTA's arguments for the same reasons we discussed in the *LEC-CMRS Safeguards Order*. ITTA offers no new information in the record that suggests that the facts underlying that Order have changed, or that its conclusions should be disturbed. As AT&T notes, the arguments raised in connection with the first forbearance criterion were considered previously by the Commission when it concluded in the *LEC-CMRS Safeguards Order* that mid-sized LECs have sufficient opportunity and incentive through their control of bottleneck facilities, upon which CMRS providers must rely, to harm the in-region CMRS market by engaging in cost misallocation, access discrimination, and price squeezes.[40] The Commission therefore concluded that the LEC-CMRS safeguard requirements are necessary to help prevent and detect such anticompetitive activity.[41] Although the Commission had, in the past, concluded that accounting safeguards were sufficient to combat such anticompetitive abuses by LECs providing personal communications service (PCS) or other CMRS, it recognized in the *LEC-CMRS Safeguards Order* that earlier decisions placing exclusive reliance upon such protections "were not based upon a full analysis of the competitive harms that might result from LEC provision of [specialized mobile radio], PCS and cellular, particularly with respect to discrimination against unaffiliated competitors requesting interconnection."[42] The Commission noted that its interest in ensuring that PCS became a viable service may have caused it to underestimate the incentives and ability of incumbent LECs to discriminate against unaffiliated CMRS providers when the Commission initially choose not to require a separate affiliate for the provision of in-region CMRS.[43] The Commission also found that a separate affiliate requirement is "a very effective way to afford the requisite degree of 'transparency' to enable competitors and the Commission to detect discrimination in interconnection."[44] The ability and incentive of incumbent LECs, including mid-sized LECs, to engage in anticompetitive activity precludes us from finding that the LEC-CMRS safeguard requirements are not necessary to ensure that mid-sized LECs' charges, practices, or classifications are just and reasonable, and are not unjustly or unreasonably discriminatory under section 10(a) of the Act.

11. We also find unpersuasive ITTA's argument that the accounting and cost allocation rules in Parts 32 and 64 are sufficient to prevent anticompetitive conduct by

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[40] AT&T comments at 19.

[41] *Id.* at 15690, ¶ 31 *et passim*.

[42] *Id.* at 15700, ¶ 52.

[43] *Id.* at 15701, ¶ 52.

[44] *Id.* at 15700, ¶ 50.

incumbent LECs in markets where they control bottleneck facilities.[45] The Commission considered the use of only the accounting and cost allocation rules in the *LEC-CMRS Safeguards Order*, and found them to be appropriate protections to incumbent LEC provision of CMRS service out-of-region because the geographic separation between the LEC's in-region service and the out-of-region CMRS mitigates the potential for undetected improper cost allocations.[46] We concluded that accounting safeguards and cost allocation rules are not sufficient, by themselves, to address our concerns regarding discrimination in interconnection arrangements.[47] We found that a separate affiliate requirement was necessary because accounting safeguards do not protect against interconnection discrimination.[48] We found that requiring a separate affiliate is an appropriate means to ensure that an incumbent LEC does not anticompetitively favor its in-region CMRS operations with regard to interconnection charges and practices.[49] Without a separate affiliate requirement, it would be more difficult for non-affiliated CMRS providers to determine whether their interconnection arrangements with the LEC are comparable to those between the LEC and its affiliated CMRS provider.[50] ITTA presents nothing in its petition to persuade us to repudiate this view.

12. In the *LEC-CMRS Safeguards Order*, we recognized the potentially different circumstances of mid-sized incumbent LECs from larger incumbent LECs. Specifically, we provided procedures in the rules for mid-sized LECs to obtain either a suspension or modification of the separation requirements. Section 20.20 provides that the Commission will grant such a petition "where the incumbent LEC demonstrates that suspension or modification of the separate affiliate requirement is: (A) necessary to avoid a significant adverse economic impact on users of telecommunications services generally or to avoid a requirement that would be unduly economically burdensome, and (B) consistent with the

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[45] *See* ITTA Petition at 44.

[46] *LEC-CMRS Safeguards Order*, 12 FCC Rcd at 15694-95, ¶ 39-40 ("To the extent there is potential for incumbent LECs that provide out-of-region CMRS to engage in anticompetitive behavior or cost misallocations we believe that such potential is adequately addressed through accounting requirements and other non-structural safeguards." *Id.* at 15694, ¶ 40)

[47] *LEC-CMRS Safeguards Order*, 12 FCC Rcd at 15692-93, ¶ 37, 39.

[48] *Id.* at 15692, ¶ 37.

[49] *Id.* at 15703, ¶ 57.

[50] *Id.* at 15700, ¶ 50.

public interest, convenience, and necessity."[51] The Commission stated that suspension or modification would be appropriate, for example, where the mid-size incumbent LEC could show that it "lacks the incentives and ability to use bottleneck facilities to act anticompetitively, such as where the percentage of overlap exceeds the 10 percent standard for de minimis overlap, but is still not significant."[52] As AT&T points out in its comments, ITTA makes no attempt to make any of these specific showings in arguing against the LEC-CMRS safeguard requirements, but rather merely asserts that they are unnecessary because nonstructural safeguards are sufficient.[53] The record here provides no basis, in the face of our contrary findings in the *LEC-CMRS Safeguards Order*, for deciding that there need be no LEC-CMRS safeguards requirements for mid-sized LECs.

13. With regard to price squeezes, ITTA asserts that they are "unlikely" because of the effect of developing competition in the CMRS market are "unlikely to be successful" because "the vastly different 'footprints' of telephone and CMRS operating territories" make it impossible "for a mid-size ILEC to use its interconnection fees or practices, or the revenues derived therefrom, to engage in anticompetitive behavior or a price squeeze."[54] Again, we find such generalized assertions unpersuasive in the face of the more detailed contrary price squeeze analysis in the *LEC-CMRS Safeguards Order*.[55]

14. As for the second forbearance criterion, we find that the record does not demonstrate that application of the LEC-CMRS safeguard requirements to mid-sized LECs is not necessary for the protection of consumers. ITTA argues that the LEC-CMRS safeguard requirements are unnecessary to protect consumers for the same reasons that they are unnecessary to protect from unreasonable rates and discriminatory practices.[56] We reject these arguments, as discussed above. The use of separate affiliates helps aid in prevention and detection of anticompetitive conduct by independent LECs, since arms length transactions between LECs and their CMRS affiliates and the requirement that agreements be reduced to writing assist the Commission and competing CMRS providers in detection of anticompetitive

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[51] 47 C.F.R. § 20.20(d)(2).

[52] *LEC-CMRS Safeguards Order*, 12 FCC Rcd at 15710, ¶ 71.

[53] AT&T Comments at pp. 18-19.

[54] ITTA Petition at 45.

[55] *See LEC-CMRS Safeguards Order*, 12 FCC Rcd at 15705-6, ¶¶ 62-63.

[56] *Id.* at 44-45.

activity.[57] In the *LEC-CMRS Safeguards Order*, we found that the safeguards set out in section 20.20 "ensure the minimum necessary level of transparency to police price and nonprice discrimination concerns[.]"[58]

15. Finally, we conclude that the record fails to show that forbearance from application of the LEC-CMRS safeguard requirements to mid-sized LECs is consistent with the public interest. ITTA argues that forbearance will serve the public interest because the *LEC-CMRS Safeguards Order*'s separate affiliate requirement is "an unnecessary regulatory burden," relief from which would enhance competition by allowing mid-sized LECs to redirect revenues aimed at maintaining structural separation to the improvement of existing services, create business organizations that are responsive to consumer needs, and help streamline operations, which would cut costs and realize consumer benefits in the form of improved customer service and innovative service offerings.[59]

16. We reject ITTA's arguments. As with the first two forbearance criteria, we find that commenters raise no arguments not already considered and rejected in the *LEC-CMRS Safeguards Order*. We there concluded that, whenever the geographic overlap between the incumbent LEC's wireline local telephone service area and the LEC's CMRS service area "passes the 10 percent overlap threshold . . . the benefits of preventing the competitive harm inherent in the incumbent LEC-CMRS relationship significantly outweigh the costs imposed by these safeguards."[60] Moreover, the safeguards imposed by the Commission, and its associated sunset and suspension or modification procedures, are narrowly tailored to address the potential for anticompetitive activity inherent in LEC provision of CMRS, particularly discrimination in the provision of interconnection to unaffiliated CMRS providers. As the Commission explained in the *LEC-CMRS Safeguards Order,* these restrictions strike a balance between the need to protect consumers and competitors from anticompetitive behavior by incumbent LECs and the burdens placed on LECs by our rules.[61] Section 20.20 is much less stringent than our previous rule. While it does require a separate affiliate, that affiliate may share officers and employees with the incumbent LEC.[62] The affiliate may also own its own

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[57] *LEC-CMRS Safeguards Order*, 12 FCC Rcd at 15690, ¶¶ 31.

[58] *Id.* at 15704, ¶ 61.

[59] ITTA Petition at 46.

[60] *LEC-CMRS Safeguards Order*, 12 FCC Rcd at 15699, ¶ 48.

[61] *Id.* at 15702-3, ¶ 56.

[62] *See id.* at 15706, ¶ 54.

wireline local exchange facilities, and does not prohibit the affiliate from using the affiliated incumbent LEC's central office, switch, roof space or other facilities.[63] As such, these restrictions are much less intrusive and more supportive of competition than it would be to bar LEC entry into in-region provision of CMRS altogether. Again, we find no basis, either in the record or in ITTA's unsupported description of the speculative consumer benefits "redirected revenues" would provide, to disturb our conclusion that protecting those consumers from the harms inherent in anticompetitive abuses through the application of the *LEC-CMRS Safeguards Order* requirements would outweigh such potential benefits.

17. For the reasons explained herein, we conclude that the record fails to demonstrate that the forbearance criteria contained in section 10 of the Communications Act are met for the LEC-CMRS safeguards requirements for mid-sized LECs. We therefore deny ITTA's request that we forbear from applying these requirements to mid-sized LECs.

B. Petition for Reconsideration

18. In its Petition for Reconsideration, ITTA requests that the Commission eliminate the requirements adopted in the *LEC-CMRS Safeguards Order* for mid-sized telephone companies.[64] ITTA argues that imposing such requirements "reverse[s] long-standing Commission policy [and] contradicts both the deregulatory policies that Congress sought to further by adopting the 1996 Act."[65] It contends that our separate affiliate requirements will impose substantial burdens on mid-sized LECs without producing any appreciable gains in CMRS competition.[66] ITTA disputes the Commission's concern that a mid-sized LEC will use "bottleneck facilities" to engage in discriminatory interconnection practices because CMRS service areas are typically much larger than those of a mid-sized LEC, so the mid-sized LEC is often required to enter into interconnection agreements with LECs in adjoining markets."[67] ITTA argues that this makes it infeasible for the mid-sized LEC to engage in discriminatory interconnection practices with independent CMRS competitors.[68] Finally, ITTA contends that the ability to petition for suspension or

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[63] *See id* at 15707-8, ¶¶ 65-67.

[64] Petition for Reconsideration at 3.

[65] *Id.* at 2.

[66] *Id.*

[67] *Id.* at 8-9.

[68] *Id.*

modification of the separate affiliate requirements does not relieve mid-sized LECs of this regulatory burden.[69]

19. We find that the ITTA Petition for Reconsideration does not raise any issues or present any information not already considered in the *LEC-CMRS Safeguards Order*, and therefore deny the petition. We are cognizant that we imposed the separate affiliate requirement on carriers that had not been subject to such requirements previously, and thoroughly discussed and explained our action in the *LEC-CMRS Safeguards Order*.[70] We also recognized the burdens that would be imposed upon those carriers by extending the safeguards to include them.[71] Indeed, that is why we provided the exemption for rural telephone companies and allowed mid-size companies to petition for suspension or modification of the requirements.[72] As we have discussed above, section 20.20 specifically contemplates alteration of the safeguards if a mid-size company can demonstrate that in its particular case the burdens imposed by these requirements is "(A) necessary to avoid a significant adverse economic impact on users of telecommunications services generally or to avoid a requirement that would be unduly economically burdensome, and (B) consistent with the public interest, convenience, and necessity."[73] ITTA has provided no new information that supports a change in these requirements at this time.

IV. ORDERING CLAUSES

20. Accordingly, IT IS ORDERED that pursuant to sections 1, 2, 4, 10, 201, and 202, of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 160, 201, and 202, the Petition for Reconsideration in WT Docket No. 96-162 filed by the Independent Telephone and Telecommunications Alliance is DENIED.

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[69] *Id.* at 9.

[70] *LEC-CMRS Safeguards Order*, 12 FCC Rcd at 15690-92, ¶¶ 31-36.

[71] *Id.* at 15702-3, ¶ 56, 15709-12, ¶¶ 69-77.

[72] *Id.* at 15709-12, ¶¶ 69-76.

[73] 47 C.F.R. § 20.20(d)(2). *See also LEC-CMRS Safeguards Order*, 12 FCC Rcd at 15712, ¶ 76.

21. IT IS FURTHER ORDERED that pursuant to sections 1, 2, 4, 10, 201, and 202, of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 160, 201, and 202, the Petition for Forbearance filed by the Independent Telephone and Telecommunications Alliance is DENIED to the extent discussed herein.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

Concurring Statement
of
Commissioner Susan Ness

Re: *Memorandum Opinion and Order on Independent Telephone & Telecommunications Alliance's Petitions for Forbearance for 2% Mid-Size Local Exchange Companies and for Reconsideration of the Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services: Implementation of Section 601(d) of the Telecommunications Act of 1996*

The Independent Telephone and Telecommunications Alliance's (ITTA) petition for forbearance provides an opportunity to take a hard look at the Commission's rule requiring incumbent local exchange carriers (LECs), including mid-size LECs, to form a separate affiliate before providing in-region commercial mobile radio service (CMRS). The rule is designed to prevent an incumbent LEC from misallocating costs to its regulated local exchange business in order to benefit its competitive CMRS affiliate operations and to detect discriminatory interconnection practices and pricing by the incumbent LEC against unaffiliated CMRS providers.

While the separate affiliate rule serves these important purposes, structural separation becomes less essential as competition in both the local exchange market and CMRS market develops. Although the *CMRS market* is becoming increasingly competitive, I am not convinced from the record in this proceeding that sufficient competition has developed in the *local exchange market* to protect consumers if we were to forbear from the separate affiliate rule. For this reason, I concur with three of my colleagues in denying ITTA's petition on behalf of mid-sized LECs.

I only concur, rather than join my colleagues, in denying forbearance, because, in my view, the Commission did not conduct a rigorous forbearance analysis in this instance. The analysis primarily relied on findings made in the 1997 *LEC-CMRS Report & Order* with little consideration of whether complaints had been lodged against mid-size LECs or current competitive conditions. The Commission has a duty to undertake a thorough Section 10 analysis. Of course this includes consideration of any evidence presented in the record, but the record should be the starting point, rather than the ending point, for the Commission's analysis.

Other factors could have been considered in the analysis. For example, before the separate affiliate requirements were imposed on mid-size LECs, there were few, if any, complaints lodged by unaffiliated CMRS carriers against mid-size LECs relating to improper cross-subsidization or discriminatory interconnection. Interestingly, no unaffiliated CMRS carriers filed comments raising these concerns about mid-size LECs if the separate affiliate requirement were to be lifted by the Commission. Also, as we transition to a competitive marketplace, there may be other less burdensome regulatory approaches to safeguard unaffiliated CMRS carriers and their customers from a mid-size LEC's market power over local exchange service. Now that interconnection agreements have been entered into between LECs and unaffiliated CMRS carriers, these agreements could serve as a benchmark for assessing the interconnection terms provided by mid-size LECs to unaffiliated CMRS carriers alleging interconnection discrimination.

Ultimately, consideration of these factors may not have changed the outcome of the Commission's decision in this case. However, in the future, the Commission should strive to be more comprehensive and aggressive when conducting its forbearance analyses.

I look forward to working with both mid-size LEC and CMRS carriers to develop a more robust record so that the Commission can determine whether our structural separation rules continue to promote competition or now detract from competition.

CONSOLIDATED SEPARATE STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

Re: Petition for Forbearance of the Independent Telephone & Telecommunications Alliance; Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area

I support these items to the extent that they provide the relief requested by the Independent Telephone & Telecommunications Alliances (ITTA) petition. I object, however, to the extent that the regulatory relief requested is denied or some lesser regulatory relief is provided. Moreover, I question the overall approach that the Commission has taken to this forbearance petition.

I start with the presumption that the ITTA petition has been "deemed granted" in full because of the Commission's failure either (i) to deny the petition within one year after receiving it, or (ii) to make an explicit finding that a 90 day extension was necessary to meet the statutory requirements. Section 10 of the Communications Act is very clear: "The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a)." The statute is thus specific that it is the "Commission" which must grant any extension and must do so upon a finding that the extension is necessary to meet the purposes of section 10(a). I do not believe that the bureau, acting on its own motion and without even prior consultation with the "Commission," can act to extend this statutory time-frame. I do not believe that the 90 day extension can be effectively used by the bureau without even briefing the Commission on the merits of the underlying petition, determining whether or not there are any new or novel questions of fact, law or policy, and receiving some signal from a majority of the "Commission" that an extension of time is warranted under these particular circumstances.

In addition, I disagree with several aspects of the approach that the Commission has taken to this forbearance petition. In several instances, the Commission determines that ITTA has not met the criteria for forbearance to the extent that the petition requests relief beyond that which is granted in a contemporaneous rulemaking proceeding. *See e.g.*, Petition for Forbearance of the Independent Telephone & Telecommunications Alliance, Third Memorandum Opinion and Order in AAD File No. 98-43, at para. 10 (denying relief to the extent that petition "extends beyond the relief granted in the *LEC Classification Second Order on Reconsideration.*") *See also*, Petition for Forbearance of the Independent Telephone & Telecommunications Alliance, Sixth Memorandum Opinion and Order in AAD File No. 98-43, at para. 2 ("Although we do not grant forbearance from our rules regarding applications for special permission at this time, we are considering whether, and how, we should modify

some of our rules that necessitate applications for special permission as part of our ongoing biennial review rulemaking and expect to make a final decision on the basis of that more complete record in the near future."). I am troubled that the Commission has decided to provide some lesser form of regulatory relief than that which was requested -- doing so in a separate rulemaking where the Commission has more discretion -- and then has used that proceeding as part of the justification for denying full regulatory forbearance as requested. In other words, the Commission has determined that the simplest method of dealing with these petitions is to deny the forbearance relief at issue while at the same time providing lesser relief in a separate rulemaking proceeding. But that is not the process the statute requires. Moreover, under such an approach, the Commission is able to avoid the difficult question of why, when considering the same facts, particular regulatory relief is appropriate and other regulatory relief would contravene the statute. Such distinctions would frequently be difficult to justify as the forbearance criteria focus on general standards -- e.g. "protection of consumers," or "in the public interest." I object to the Commission's attempt to avoid the objective rigor of the section 10 forbearance test by providing regulatory relief in separate proceedings where the Commission has more discretion.

In addition, this approach lends itself to eliminating one set of requirements and at the same time adopting new -- albeit lesser -- regulatory restrictions that would not be justified under section 10 alone. *See e.g.*, Biennial Regulatory review of Accounting and Cost Allocation Requirements, Petition for Forbearance of the Independent Telephone & Telecommunications Alliance, Fourth Memorandum Opinion and Order in AAD File No. 98-43, at par. 25 (reinterpreting ITTA petition as not asking to forbear from Class A accounting altogether but "[e]ssentially . . . asking us to change our rules, not to forbear from applying the current rules."). While section 10 provides that the Commission may be able to forbear "in whole or in part" from a particular provision or regulation, *see* section 10(c), it does not provide the Commission with any authority to *adopt* new regulations or to *impose* separate conditions in the context of a forbearance petition. Section 10's primary emphasis is on deregulation, and I will not support this provision, or any of the proceedings required by a section 10 petition, being used as an opportunity to authorize new regulatory restrictions or conditions. I fear that this type of expansive reading of the Commission's authority under the Act's forbearance provisions will lead the Commission astray from its clear statutory duties and limitations.

Finally, as I have stated previously, I am concerned that the Commission is placing too high a burden on the parties requesting forbearance relief. I believe that the Section 10 forbearance scheme requires the Commission to justify continued regulation in light of the competitive conditions in the marketplace. The Commission cannot meet their statutory obligations by simply shifting the burden to petitioners to justify forbearance.

SEPARATE STATEMENT OF COMMISSIONER MICHAEL K. POWELL

Re: Petition for Forbearance of the Independent Telephone and Telecommunications Alliance (AAD File No. 98-43), *and related proceedings* (CC Docket No. 97-11, CC Docket No. 98-81, CC Docket No. 96-150, CC Docket No. 98-117, WT Docket No. 96-162, CC Docket No. 96-149, CC Docket No. 96-61)

I am pleased to join my colleagues in granting some of the regulatory relief requested in the forbearance petition filed by the Independent Telephone and Telecommunications Alliance (ITTA) on behalf of mid-sized local exchange carriers. Although I concur in the results of most of these items (especially where regulatory relief is granted), I am, however, compelled to dissent in part to three of the decisions, and I continue to be concerned about the Commission's handling and analysis of forbearance requests under section 10 of the Communications Act.

In these various items (some concern other ongoing rulemaking proceedings), we address nine regulatory requirements from which ITTA, on behalf of mid-sized LECs, requested forbearance. We adopted seven different Orders in response to the petition (and other petitions or notices). In looking at these Orders as a package and individually, while some relief is granted, I continue to be concerned that, where forbearance is denied, these petitions are not being treated in a manner fully consistent with the intent and spirit of section 10 of the Act. While I concur with the outcome of most of these items -- since I believe we are reaching the correct result -- I do continue to question (along lines similar to those I have expressed elsewhere) our means and methods for handling forbearance petitions.

I must respectfully dissent, however, from the continued application of separate affiliate requirements for the provision of in-region interexchange services and commercial mobile radio services (CMRS) by mid-sized LECs. My reasons are twofold. First, I continue to be uneasy with the degree to which reliance on this and similar regulatory devices is based on speculation about anticompetitive behavior. I fully understand that any analysis about potentially harmful future conduct entails some assessment of likely conduct. Historically, the agency has stewarded the basic principle of nondiscrimination, resulting in regulatory protections against cost misallocation and anticompetitive behavior flowing from control of a "bottleneck" facility. Our precedents, such as separate affiliate requirements, were rightly premised on the existence of a true monopolist (sanctioned by the state) and the associated risks. In that environment, not only did the incumbent have monopoly power, there was no prospect of competition nor any watchful present or future competitors. These safeguards were designed to protect consumers from the potential ill effects of such accumulated power.

I believe, however, that much has changed. The movement toward a competitive environment means that we must take into fuller consideration the necessity, viability, and the potentially distorting competitive consequences of old familiar regulatory devices. Thus, to the extent we must speculate about potential harm (to competition and consumers)

we must, too, factor in more fully the potential disciplining effects of both real competition and potential competition. I see a continued tendency to invoke the ancient mantra "to protect against discriminatory this or that" as glib justification for continued regulatory constraints. I believe we must work harder and press more heavily on the traditional rationales. I do not believe we did so in this case. Moreover, to do so will take time and resources, which we do not have when forbearance petitions are presented for deliberation with only a second or two left on the statutory shot-clock, as was the case here.

My second concern rests with the extent that the Commission expresses a tendency to justify certain regulatory restrictions in the name of promoting or advancing competition. That alone, of course, may be worthy, but we are not free to do so in a manner that involves intermediate judgements that differ from those reached by Congress. Let me explain more fully.

Prior to the 1996 Act, I believe both Judge Greene and the FCC did seek to create limited competitive markets out of the monopoly provider's control and, concomitantly, impose safeguards designed to keep the monopolist from thwarting fledgling competitors as well as ensuring that core regulatory goals were not compromised by such competitive forays. These competitive excursions were limited and usually merely incremental voyages into competitive service markets. But, we must be reminded that the fundamental paradigm remained regulation and central control over the most prized services. The key point is that Judge Greene and the Commission had a fairly wide birth to develop the conditions of their market-opening efforts.

The 1996 Act, however, altered the paradigm and structured the basic terms of competition. Competitive services were to become the rule, and regulated services the limited exceptions. By its act, Congress crafted a comprehensive competitive model, designed specifically to supplant the MFJ. In weaving this fabric, Congress made a number of significant judgements. The one most relevant here is that it concluded that, rather than restrict the ILECs to regulated wholesale service, it allowed ILECs to compete at the retail level as well. This judgement may prove unwise or unworkable, but it is the one that Congress chose.

Congress was not oblivious to the challenges or perils of allowing the ILECs to compete, however, in long distance and other services while they still controlled many of the necessary facilities and inputs that other competitors would need. It addressed this problem by crafting an access and interconnection regime (sections 251 and 252) that placed unique duties and obligations on ILECs. In addition, Congress recognized that different classes of LECs required different levels of safeguards and incentives. Bell Operating Companies (BOCs), and they alone, are subject to sections 271 and 272. ILECs have more duties and obligations than CLECs, and so on. Thus, whether one likes it or not, *Congress* substantially addressed the dangers of "bottleneck control" and discriminatory incentives in the Act.

As a consequence, I believe, the Commission is not as free (as it perhaps was prior to the Act) to steward a transition to a competition regime different than that of the one chosen by Congress. Specifically, as it relates to the question of separate affiliates, we must be careful not to impose regulatory requirements that in practical effect amount to wholesale/retail separations, where Congress intended none. (I note that in contrast to the carriers petitioning here, BOCs are expressly subject to separate affiliates for some services). For this reason, I am uncomfortable with the analysis proffered to support continued separate affiliate requirements. We cite "bottlenecks" and "incentives" in what subtly (though perhaps unintentionally) seems to me a preference for wholesale separation in a competitive market. By way of illustration, the Orders often speak of the importance of separate affiliates to ensure that they obtain facilities on an "arm's length basis" and to ensure that all competing in-region providers and other carriers have the same access (*i.e.*, wholesale).

Though Congress made judgements about the competitive ground-rules, it did not endeavor to sweep through our regulations and apply those judgments to each and every structural requirement on the books. Instead, it directed us to search out such rules and apply the new paradigm. To do so, it gave the Commission the twin engines of the biennial review and forbearance. This is one reason I believe that section 10 is important in evaluating the continued validity of separate affiliate requirements, not otherwise mandated by law, where competitive conditions and/or other regulatory or enforcement mechanisms are already in place.

I believe that the petition before us raised substantial questions with regard to the need for structural separation in light of present conditions. Accordingly, I believe that in response to ITTA's forbearance petition, we should have examined more carefully alternative methods of enforcing core ILEC responsibilities to see if there wasn't a more rational, limited approach. For example, we should have explored including a sunset of the structural separation requirement for in-region interexchange services like that available to BOCs in section 272 and treating mid-sized LECs more like rural carriers under the CMRS separate affiliate requirement.

For these reasons, I respectfully dissent in part from these particular decisions.